

AN ACT

ENTITLED, An Act to revise certain provisions relating to trust administration.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 51A-6A-13 be amended to read as follows:

51A-6A-13. The business of any trust company shall be managed and controlled by its governing board and includes the authority to provide for bonus payments, in addition to ordinary compensation, for any of its officers and employees. The governing board shall consist of not less than three nor more than twelve members, all of whom shall be elected by the owners of the trust company at any regular annual meeting. If the number of board members elected is less than twelve, the number of board members may be increased so long as the total number does not exceed twelve. If the number is increased, the first additional board members may be elected at a special meeting of the owners. The board members shall be elected and any vacancies filled in the manner as provided in the provisions regarding general corporations or limited liability companies, as applicable. At all times one of the directors shall be a resident of this state and at least two-thirds of the directors shall be citizens of the United States. Any board member of any trust company who becomes indebted to the trust company on any judgment forfeits the position of board member, and the vacancy shall be filled as provided by law.

Section 2. That § 55-1-24 be amended to read as follows:

55-1-24. Terms used in §§ 55-1-24 to 55-1-43, inclusive, mean:

- (1) "Beneficial interest," is limited to mean a distribution interest or a remainder interest. A beneficial interest specifically excludes a power of appointment or a power reserved by the settlor;
- (2) "Beneficiary," a person that has a present or future beneficial interest in a trust, vested or contingent. The holder of a power of appointment is not a beneficiary;

- (3) "Distribution beneficiary," a beneficiary who is an eligible distributee or permissible distributee of trust income or principal;
- (4) "Distribution interest," a distribution interest held by a distribution beneficiary. A distribution interest may be a current distribution interest or a future distribution interest. A distribution interest may be classified as a mandatory interest, a support interest, or a discretionary interest;
- (5) "Power of appointment," an inter-vivos or testamentary power to direct the disposition of trust property, other than a distribution decision by a trustee to a beneficiary. Powers of appointment are held by a person to whom a power has been given, not the settlor;
- (6) "Reach," with respect to a distribution interest or power, to subject the distribution interest or power to a judgment, decree, garnishment, attachment, execution, levy, creditor's bill or other legal, equitable, or administrative process, relief, or control of any court, tribunal, agency, or other entity as provided by law;
- (7) "Remainder interest," an interest where a trust beneficiary will receive the property outright at some time during the future;
- (8) "Reserved power," a power held by the settlor.

Section 3. That § 55-1-26 be amended to read as follows:

55-1-26. Regardless of whether or not a trust contains a spendthrift provision:

- (1) No beneficial interest, power of appointment, or reserved power in a trust may be judicially foreclosed;
- (2) No creditor may reach a power of appointment or a remainder interest at the trust level. The creditor shall wait until the funds are distributed before the creditor may reach the funds; and
- (3) No power of appointment is a property interest.

Section 4. That § 55-1-28 be amended to read as follows:

55-1-28. No creditor may reach an interest of a beneficiary or any other person who holds an unconditional or conditional removal or replacement power over a trustee. This power is personal to the beneficiary and may not be exercised by the beneficiary's creditors. No court can direct a beneficiary to exercise the power.

No creditor may reach an interest of a beneficiary who is also a trustee or a co-trustee, or otherwise compel a distribution because the beneficiary is then serving as a trustee or co-trustee. No court may foreclose against such an interest.

Section 5. That § 55-1-31 be amended to read as follows:

55-1-31. Unless otherwise provided in the trust, if the settlor's spouse is named as beneficiary, the settlor's spouse is still living, and the trust is classified as a support trust, then the trustee shall consider the beneficiary's resources, including the settlor's obligation of support, prior to making a distribution. In all other cases, unless otherwise provide in the trust, the trustee need not consider the beneficiary's resources in determining whether a distribution should be made.

Section 6. That § 55-1-32 be amended to read as follows:

55-1-32. In the event that a party challenges a settlor or a beneficiary's influence over a trust, none of the following factors, alone or in combination, may be considered dominion and control over a trust:

- (1) The settlor or a beneficiary serving as a trustee or a co-trustee as described in § 55-1-28;
- (2) The settlor or a beneficiary holds an unrestricted power to remove or replace a trustee;
- (3) The settlor or a beneficiary is a trust administrator, a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or any other managerial function of any other type of entity, and part or all of the trust property consists of an interest in the entity;

- (4) A person related by blood or adoption to the settlor or a beneficiary is appointed as trustee;
- (5) The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend is appointed as trustee;
- (6) A business associate is appointed as a trustee;
- (7) A beneficiary holds any power of appointment over any or all of the trust property;
- (8) The settlor holds a power to substitute property of equivalent value;
- (9) The trustee may loan trust property to the settlor for less than a full and adequate rate of interest or without adequate security;
- (10) The distribution language provides any discretion; or
- (11) The trust has only one beneficiary eligible for current distributions.

Section 7. That § 55-1-38 be amended to read as follows:

55-1-38. A distribution interest can be classified in three ways:

- (1) As a mandatory interest, which is a distribution interest, in which the timing of any distribution must occur within one year from the date the right to the distribution arises, and the trustee has no discretion in determining whether a distribution shall be made or the amount of such distribution;
- (2) As a support interest, which is not a mandatory interest but still contains mandatory language such as "shall make distributions" and is coupled with a standard capable of judicial interpretation; or
- (3) As a discretionary interest, which is any interest where a trustee has any discretion to make or withhold a distribution.

A discretionary interest may be evidenced by permissive language such as "may make distributions" or it may be evidenced by mandatory distribution language that is negated by the

discretionary language of the trust, such as "the trustee shall make distributions in the trustee's sole and absolute discretion." An interest that includes mandatory distribution language such as "shall" but is subsequently qualified by discretionary distribution language shall be classified as a discretionary interest and not as a support or a mandatory interest. A discretionary interest is any interest that is not a mandatory or a support interest.

Section 8. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

If a trust instrument containing the distribution language specifically provides that the trustee exercise discretion in a reasonable manner with regard to a discretionary interest, then notwithstanding any other provision of §§ 55-1-38 to 55-1-43, inclusive, the distribution interest shall be classified as a support interest. A beneficiary's right to a distribution as well as a creditor's right regarding a beneficiary's support interest is governed by § 55-1-42.

Section 9. That § 55-1-41 be amended to read as follows:

55-1-41. If the trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level. Moreover, no court may order a trustee to distribute past due mandatory distributions directly to a creditor.

Section 10. That § 55-1-42 be amended to read as follows:

55-1-42. A beneficiary of a mandatory or a support interest has an enforceable right to a distribution pursuant to a court's review. A trustee's distribution decision may be reviewed for unreasonableness, dishonesty, improper motivation, or failure, if under a duty to do so, to act. This does not, however, raise the beneficiary's support interest to the level of a property interest.

If the trust contains a spendthrift provision, notwithstanding the beneficiary's right to force a distribution with regard to a mandatory or support interest, no creditor may force a distribution with regard to a mandatory or support interest. No creditor may reach present or future support distributions with regard to a mandatory or support interest.

Regardless of whether a beneficiary has any outstanding creditor, a trustee of a mandatory or a support interest may directly pay any expense on behalf of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a mandatory or support interest.

Section 11. That § 55-1-43 be amended to read as follows:

55-1-43. The following provisions apply only to discretionary interests:

- (1) A discretionary interest is neither a property interest nor an enforceable right. It is a mere expectancy;
- (2) No creditor may force a distribution with regard to a discretionary interest. No creditor may require the trustee to exercise the trustee's discretion to make a distribution with regard to a discretionary interest;
- (3) A court may review a trustee's distribution discretion only if the trustee:
 - (a) Acts dishonestly;
 - (b) Acts with an improper motive; or
 - (c) Fails, if under a duty to do so, to act.

A reasonableness standard may not be applied to the exercise of discretion by the trustee with regard to a discretionary interest. Other than for the three circumstances listed in this subdivision, a court has no jurisdiction to review the trustee's discretion or to force a distribution.

Absent express language to the contrary, in the event that the distribution language in a discretionary interest permits unequal distributions between beneficiaries or distributions to the exclusion of other beneficiaries, the trustee may distribute all of the accumulated, accrued, or undistributed income and principal to one beneficiary in the trustee's discretion.

Regardless of whether a beneficiary has any outstanding creditor, a trustee of a discretionary interest may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying

the expenses of a beneficiary of a discretionary interest.

Section 12. That § 55-1A-9.1 be amended to read as follows:

55-1A-9.1. (a) As used in this section:

- (1) "Investment" means any security as defined in § 2(a)(1) of the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of § 2(i) of the Commodity Exchange Act, or any other asset permitted for trustee accounts pursuant to the terms of this title or by the terms of the governing instrument, including by way of illustration and not limitation, individual portfolios of investment holdings, shares or interests in a private investment fund (including a private investment fund organized as a limited partnership, limited liability company, trust or other form, a statutory or common law business trust, or a real estate investment trust), joint venture or other general or limited partnership, or an open-end or closed-end management type investment company or investment trust registered, unregistered, or exempt from registration under the Investment Company Act of 1940;
- (2) "Affiliate" means any corporation or other entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the trustee;
- (3) "Affiliated Investment" means an investment for which the trustee or an affiliate of the trustee acts as investment adviser, sponsor, administrator, distributor, placement agent, underwriter, broker, custodian, transfer agent, registrar or in any other capacity for which it receives or has received a fee or commission from such investment or an investment acquired or disposed of in a transaction for which the trustee or an affiliate of the trustee receives or has received a fee or commission;
- (4) "Fee or commission" means compensation paid to a trustee or an affiliate thereof on

account of its services to or on behalf of an investment, including by way of illustration and not limitation, advisory fees, management fees, brokerage fees, service fees, special performance fees, profit allocations, and expense reimbursements.

(b) In the absence of an express prohibition in the trust instrument, a trustee may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment and, upon satisfaction of the conditions stated in subsection (c) of this section, such trustee may receive trustee compensation from such account at the same rate as the trustee would otherwise be entitled to be compensated.

(c) A trustee seeking compensation pursuant to subsection (b) of this section shall disclose to all qualified beneficiaries, as defined in § 55-2-13, all fees, commissions, compensation or other benefits and profits paid or to be paid by the account, or received or to be received by an affiliate arising from such affiliated investment. The disclosure required under this subsection may be given either in a copy of the prospectus or any other disclosure document prepared for the affiliated investment under federal or state securities laws or in a written summary that includes all fees, commissions, compensation or other benefits and profits received or to be received by the trustee or any affiliate of the trustee and an explanation of the manner in which such fees, commissions, compensation or other benefits and profits are calculated (either as a percentage of the assets invested or by some other method). Such disclosure shall be made at least annually unless there has been no increase in the rate at which such fees or commissions are calculated since the most recent disclosure.

(d) A trustee that has complied with subsection (c) of this section (whether by making the applicable disclosure or by relying on the terms of a governing instrument or court order) shall have full authority to administer an affiliated investment (including the authority to vote proxies thereon) without regard to the affiliation between the trustee and the investment.

Section 13. That § 55-1B-2 be amended to read as follows:

55-1B-2. An excluded fiduciary is not liable, either individually or as a fiduciary, for any of the following:

- (1) Any loss that results from compliance with a direction of the trust advisor, custodial account owner, or authorized designee of a custodial account owner;
- (2) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization;
- (3) Any loss that results from any action or inaction, except for gross negligence or willful misconduct, when an excluded fiduciary is required, pursuant to the trust agreement or any other reason, to assume the role of trust advisor, trust protector, investment trust advisor, or distribution trust advisor.

Any excluded fiduciary is also relieved from any obligation to perform investment or suitability reviews, inquiries, or investigations or to make recommendations or evaluations with respect to any investments to the extent the trust advisor, custodial account owner, or authorized designee of a custodial account owner had authority to direct the acquisition, disposition, or retention of any such investment.

Nothing in subdivision (2) imposes an obligation or liability with respect to a custodian of a custodial account.

Section 14. That § 55-1B-6 be amended to read as follows:

55-1B-6. The powers and discretions of a trust protector shall be as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons. Such powers and discretion may include the following:

- (1) Modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;
- (2) Increase or decrease the interests of any beneficiaries to the trust;
- (3) Modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;
- (4) Remove and appoint a trustee, trust advisor, investment committee member, or distribution committee member;
- (5) Terminate the trust;
- (6) Veto or direct trust distributions;
- (7) Change situs or governing law of the trust, or both;
- (8) Appoint a successor trust protector;
- (9) Interpret terms of the trust instrument at the request of the trustee;
- (10) Advise the trustee on matters concerning a beneficiary;
- (11) Amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust; and
- (12) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-13.

The powers referenced in subdivisions (5), (6), and (11) may be granted notwithstanding the provisions of §§ 55-3-24 to 55-3-28, inclusive.

Section 15. That § 55-1B-11 be amended to read as follows:

55-1B-11. The powers and discretions of a distribution trust advisor shall be provided in the trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the distribution trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document provide

otherwise, the distribution trust advisor shall direct the trustee with regard to all discretionary distributions to beneficiaries. The distribution trust advisor may also provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-13.

Section 16. That § 55-2-13 be amended to read as follows:

55-2-13. For purposes of this section, the term, qualified beneficiary, means a beneficiary who is twenty-one years of age and who, on the date the beneficiary's qualification is determined:

- (1) Is a distributee or permissible distributee of trust income or principal;
- (2) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees terminated on that date; or
- (3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Except as otherwise provided by the terms of a revocable trust, a trustee has no duty to notify the qualified beneficiaries of the trust's existence.

Except as otherwise provided by the terms of an irrevocable trust or otherwise directed by the settlor, distribution advisor, or trust protector, the trustee shall, within sixty days after the trustee has accepted trusteeship of the trust, or within sixty days after the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, notify the qualified beneficiaries of the trust's existence and of the right of the beneficiary to request a copy of the trust instrument pertaining to the beneficiary's interest in the trust.

Subject to the previous provision, a trustee of an irrevocable trust:

- (1) Upon request of a qualified beneficiary, shall promptly furnish to the qualified beneficiary a copy of the trust instrument;
- (2) If notification of the trust has not been accomplished pursuant to this section within sixty days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance

and of the trustee's name, address, and telephone number;

- (3) Shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust, unless the request is unreasonable under the circumstances.

A beneficiary may waive the right to the notice or information otherwise required to be furnished under this section and, with respect to future reports and other information, may withdraw a waiver previously given.

The change in the identity of a trustee, occurring as the result of a mere name change or a merger, consolidation, combination, or reorganization of a trustee, does not require notice.

If a fiduciary is bound by a duty of confidentiality with respect to a trust or its assets, a fiduciary may require that any beneficiary who is eligible to receive information pursuant to this section be bound by the duty of confidentiality that binds the trustee before receiving such information from the trustee.

A trust advisor, trust protector, or other fiduciary designated by the terms of the trust shall keep each excluded fiduciary designated by the terms of the trust reasonably informed about:

- (1) The administration of the trust with respect to any specific duty or function being performed by the trust advisor, trust protector, or other fiduciary to the extent that the duty or function would normally be performed by the excluded fiduciary or to the extent that providing such information to the excluded fiduciary is reasonably necessary for the excluded fiduciary to perform its duties; and
 - (2) Any other material information that the excluded fiduciary would be required to disclose to the qualified beneficiaries under this section regardless of whether the terms of the trust relieve the excluded fiduciary from providing such information to qualified beneficiaries.
- Neither the performance nor the failure to perform of a trust advisor, trust protector, or other fiduciary designated by the terms of the trust as provided in this subdivision shall

affect the limitation on the liability of the excluded fiduciary.

The provisions of this section are effective for trusts created after July 1, 2002, except as otherwise directed by the settlor, trust protector, or distribution trust advisor.

Section 17. That § 55-2-15 be amended to read as follows:

55-2-15. Unless the terms of the instrument expressly provide otherwise, a trustee who has discretionary authority, under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to make a distribution of income or principal to, or for the benefit of, one or more beneficiaries of a trust (the "first trust"), may instead exercise such authority by appointing all or part of the income or principal subject to the power in favor of a trustee of a trust (the "second trust") under an instrument other than that under which the power to distribute is created or under the same instrument, in the event that the trustee of the first trust decides that the appointment is necessary or desirable after taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution. However, the following apply:

- (1) The second trust may have as beneficiaries only one or more of those beneficiaries of the first trust to or for whom a discretionary distribution may be made from the first trust and who are proper objects of the exercise of the power, or one or more of those other beneficiaries of the first trust to or for whom a distribution of income or principal may have been made in the future from the first trust at a time or upon the happening of an event specified under the first trust;
- (2) No trustee of the first trust may:
 - (a) Exercise such authority to make a distribution from the first trust if the trustee is a beneficiary of the first trust, or if any beneficiary may change the trustees of the first trust, unless the exercise of such authority is for health, education, maintenance, or support; or

- (b) Exercise such authority to the extent that doing so would have the effect either of
 - (i) increasing the distributions that can be made in the future from the second trust to the trustee of the first trust or to a beneficiary who may change the trustees of the first trust, or
 - (ii) removing restrictions on discretionary distributions imposed by the agreement under which the first trust was created, except that in either case participating in a change that is needed for the health, education, maintenance, or support of any such beneficiary is permitted;

However, the provisions of subdivision (2) only apply to restrict the authority of a trustee if either a trustee, or a beneficiary who may change the trustee, is a United States citizen or domiciliary under the Internal Revenue Code, or the trust owns property that would be subject to United States estate or gift taxes if owned directly by such a person.

- (3) In the case of any trust contributions which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) of the Internal Revenue Code of 1986, by reason of the application of I.R.C. § 2503(c), the governing instrument for the second trust shall provide that the beneficiary's remainder interest shall vest no later than the date upon which such interest would have vested under the terms of the governing instrument for the first trust;
- (4) The exercise of such authority may not reduce any income interest of any income beneficiary of any of the following trusts:
 - (a) A trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 or for state tax purposes under any comparable provision of applicable state law;
 - (b) A charitable remainder trust under I.R.C. § 664; or
 - (c) A grantor retained annuity trust under I.R.C. § 2702;

- (5) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions, unless after the exercise of such authority, such beneficiary's power or withdrawal is unchanged with respect to the trust property;
- (6) The exercise of such authority is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

This section applies to any trust governed by the laws of this state, including a trust whose governing jurisdiction is transferred to this state.

Section 18. That § 55-2-17 be amended to read as follows:

55-2-17. For the purposes of § 55-2-15, a beneficiary shall be considered to have the power to "change the trustees" if he or she can, alone or with others, name himself or herself as a trustee or can remove a trustee and replace that trustee with a new trustee who is the beneficiary or who is related or subordinate (as defined in § 672 of the I.R.C.) to the beneficiary.

Section 19. That § 55-2-18 be amended to read as follows:

55-2-18. The exercise of the power to distribute the income or principal of the trust under § 55-2-15 shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust. The trustee of the first trust shall notify all beneficiaries of the first trust, in writing, at least twenty days prior to the effective date of the trustee's exercise of the power under § 55-2-15 (applying the South Dakota Virtual Representation Statutes, §§ 55-3-31 to 55-3-38, inclusive). If all beneficiaries entitled to notice waive the notice requirement by a signed writing delivered to the trustee, the trustee may exercise the power under § 55-2-15 immediately. A copy of the proposed exercise of this authority and the second trust agreement shall satisfy this notice obligation. For the purposes of this section, the term, beneficiaries, means those persons who would

be entitled to notice and a copy of the first trust instrument under § 55-2-13.

Section 20. That § 55-2-21 be amended to read as follows:

55-2-21. No provision of §§ 55-2-15 to 55-2-20 may be construed to abridge the right of any trustee who has power to distribute income or principal in further trust which arises under statute, common law, or the terms of the first trust.

Section 21. That chapter 55-2 be amended by adding thereto a NEW SECTION to read as follows:

Notwithstanding the terms of a trust instrument, if a settlor has a power to substitute property of equivalent value, a trustee has a fiduciary duty to determine that the substituted property is of equivalent value, prior to allowing the substitution.

Section 22. That chapter 55-3 be amended by adding thereto a NEW SECTION to read as follows:

No beneficiary of a trust may assert the defense of laches in any proceeding to modify, reform, or terminate a trust pursuant to §§ 55-3-23 to 55-3-29, inclusive.

Section 23. That chapter 55-3 be amended by adding thereto a NEW SECTION to read as follows:

In addition to other remedies available by law and procedures or powers set out in a trust instrument, the settlor, or the settlor's agent, a cotrustee, or a qualified beneficiary as defined in § 55-2-13, may request the court to remove a trustee, or a trustee may be removed by the court on the court's own initiative.

In addition to the powers otherwise granted the court, the court may remove a trustee if:

- (1) The trustee has committed a serious breach of trust;
- (2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (3) Because of unfitness, unwillingness, persistent failure of the trustee to administer the trust

effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries;

- (4) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available; or
- (5) If the trustee merges with another institution or the location or place of administration of the trust changes, and the court finds that removal of the trustee best serves the interests of all of the beneficiaries, and a suitable cotrustee or successor trustee is available.

Pending a final decision on a request to remove a trustee, the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries.

Section 24. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as follows:

Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certificate of trust containing the following information:

- (1) That the trust exists and the date the trust instrument was executed;
- (2) The identity of the settlor;
- (3) The identity and address of the currently acting trustee;
- (4) The powers of the trustee;
- (5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- (7) The manner of taking title to trust property.

A certificate of trust may be signed or otherwise authenticated by any trustee.

A certificate of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certificate of trust to be incorrect.

A certificate of trust need not contain the dispositive terms of a trust.

Section 25. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as follows:

A recipient of a certificate of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer on the trustee the power to act in the pending transaction.

Section 26. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as follows:

Any person who acts in reliance on a certificate of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the certification.

Section 27. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as follows:

Any person who in good faith enters into a transaction in reliance on a certificate of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

Section 28. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as follows:

Any person making a demand for the trust instrument in addition to a certificate of trust or

excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

Section 29. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as follows:

The provisions of sections 24 to 29, inclusive, of this Act do not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

Section 30. That § 55-5-7 be amended to read as follows:

55-5-7. No specific investment or course of action is, taken alone, prudent or imprudent. The trustee may invest in every kind of property and type of investment, subject to this chapter. The prudent investor rule is a test of conduct and not of resulting performance. The prudent investor rule may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust instrument or court order. No trustee is liable to a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust instrument or court order.

Section 31. That § 55-5-8 be amended to read as follows:

55-5-8. The trustee shall diversify the investments of the trust unless, under the circumstances, the trustee reasonably believes it is in the interests of the beneficiaries and furthers the purposes of the trust not to diversify. Regardless of concentration or lack of diversification, the trustee need not diversify if the trust instrument or court order allows or directs retention of assets forming part of the trust corpus. If a trust instrument or court order requires a fiduciary to invest in a specific investment, type of investment, or investment concentration, no trustee is liable to a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust instrument or court order.

Section 32. That § 55-5-9 be amended to read as follows:

55-5-9. The trustee shall, within a reasonable time after the acceptance of the trusteeship, review trust assets and make and implement decisions concerning the retention and disposition of original

pre-existing investments in order to conform to the provisions of this section. The trustee's decision to retain or dispose of an asset may properly be influenced by the asset's special relationship or value to the purposes of the trust or to some or all of the beneficiaries, consistent with the trustee's duty of impartiality.

If a trust owns an interest in a closely held entity, and the trust agreement provides that the trustee has no duty to inquire or review the activities of the closely held entity, no trustee is liable to a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust or court order.

For purposes of this section, the term, closely held entity, means any entity in which the following persons in aggregate own at least twenty percent of the entity:

- (1) The settlor;
- (2) The settlor's grandparents or their descendants;
- (3) The settlor's spouse; or
- (4) Any trust created by anyone of the aforementioned persons.

Section 33. That § 55-13A-104 be amended to read as follows:

55-13A-104. (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in § 55-13A-103(a), that the trustee is unable to comply with § 55-13A-103(b).

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (1) The nature, purpose, and expected duration of the trust;
- (2) The intent of the settlor;

- (3) The identity and circumstances of the beneficiaries;
- (4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;
- (5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
- (6) The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
- (8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
- (9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

- (1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
- (2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
- (3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of

the value of the trust assets;

- (4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;
- (5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;
- (6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;
- (7) If the trustee is a beneficiary of the trust; or
- (8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured

by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

(g) Unless prohibited by the governing instrument, the trustee of a trust has the power to consider gains from the sale of capital assets in the trust to be part of a distribution of principal to a beneficiary, or part of an adjustment from principal to income, and if such power is exercised, such gains shall be treated consistently by the trustee on the trust's books, records, and tax returns as part of a distribution to a beneficiary.

Section 34. That § 55-13A-202 be amended to read as follows:

55-13A-202. (a) Notwithstanding any contrary provision of this chapter, if the trust instrument adopts the provisions of this section by reference, an increase in the value of the following investments owned by a charitable remainder unitrust, of the type authorized in § 664(d)(3) of the Internal Revenue Code (26 U.S.C. § 664), as of January 1, 2009, is distributable as income when it becomes available for distribution:

- (1) A zero coupon bond;
- (2) An annuity contract before annuitization;
- (3) A life insurance contract before the death of the insured;
- (4) An interest in a common trust fund (as defined under § 584 of the Internal Revenue Code) (26 U.S.C. § 584);
- (5) An interest in a partnership, as defined in § 7701 of the Internal Revenue Code (26 U.S.C. § 7701); or
- (6) Any other obligation for the payment of money that is payable at a future time in accordance with a fixed, variable, or discretionary schedule of appreciation in excess of

the price at which it was issued.

(b) For purposes of this section, the increase in value of an investment described in subsection (a) is available for distribution only if the trustee receives cash on account of the investment.

(c) The increase in value of the obligations described in subsection (a) is distributable to the beneficiary who was the income beneficiary at the time of the increase from the first principal cash available or, if none is available, when realized by sale, redemption, or other disposition. If unrealized increase is distributed as income but out of principal, the principal shall be reimbursed from the increase when realized.

Section 35. That § 55-13A-409 be amended to read as follows:

55-13A-409. (a) In this section:

- (1) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of subsections (d), (e), (f), and (g), the term also includes any payment from any separate fund, regardless of the reason for the payment.
- (2) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest, a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent of the

part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not required to be made to the extent that it is made because the trustee exercises a right of withdrawal.

(d) Except as otherwise provided in subsection (e), subsections (f) and (g) apply, and subsections (b) and (c) do not apply, in determining the allocation of a payment made from a separate fund to:

- (1) A trust to which an election to qualify for a marital deduction under Section 2056(b)(7) of the Internal Revenue Code of 1986, has been made; or
- (2) A trust that qualifies for the marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1986.

(e) Subsections (d), (f), and (g) do not apply if and to the extent that the series of payments would, without the application of subsection (d), qualify for the marital deduction under Section 2056(b)(7)(C) of the Internal Revenue Code of 1986.

(f) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this chapter. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(g) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent

of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the Internal Revenue Code of 1986 (26 U.S.C. Section 7520), for the month preceding the accounting period for which the computation is made.

(h) This section does not apply to a payment to which § 55-13A-410 applies.

Section 36. That § 55-13A-505 be amended to read as follows:

55-13A-505. (a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

- (1) From income to the extent that receipts from the entity are allocated only to income;
- (2) From principal to the extent that receipts from the entity are allocated only to principal;
- (3) Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and
- (4) From principal to the extent that the tax exceeds the total receipts from the entity.

(d) After applying subsections (a) through (c), the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

Section 37. That § 55-13A-602 be amended to read as follows:

55-13A-602. This chapter applies to every trust or will created after July 1, 2007, except as

otherwise expressly provided in the will or the terms of the trust or in this chapter. No trust or decedent's estate based upon a will executed after July 1, 2007, may utilize the provisions of chapter 55-13. Every trust existing on June 30, 2007, or any decedent's estate existing on June 30, 2007, and based upon a will executed prior to July 1, 2007, may elect to apply the provisions of either chapter 55-13 or this chapter. The election may be made by the trustee or personal representative upon providing sixty days written notice of the election to the beneficiaries of the trust or estate, as the case may be.

Any election made prior to July 1, 2008, is hereby ratified and remains in full force and effect.

The provisions of section 35 of this Act apply to a trust described in § 55-13A-409(d) on and after the following dates:

- (1) If the trust is not funded as of July 1, 2009, the date of the decedent's death;
- (2) If the trust is initially funded in the calendar year beginning January 1, 2010, the date of the decedent's death;
- (3) If the trust is not described in subdivision (1) or (2), January 1, 2010.

Section 38. That chapter 55-15 be amended by adding thereto a NEW SECTION to read as follows:

This chapter does not apply to a charitable remainder unitrust as defined by § 664(d) of the Internal Revenue Code of 1986 (26 U.S.C. § 664), as of January 1, 2009.

Section 39. That § 55-15-6 be amended to read as follows:

55-15-6. The unitrust amount shall be determined as follows:

- (1) For the first three accounting periods of the trust, the unitrust amount for a current valuation year of the trust shall be three percent, or such higher percentage specified by the terms of the governing instrument or by the election of the trustee, the disinterested person, or the court, of the net fair market value of the assets held in the trust on the

valuation date of the current valuation year;

- (2) Beginning with the fourth accounting period of the trust, the unitrust amount for a current valuation year of the trust shall be three percent, or such higher percentage specified by the terms of the governing instrument or by the election of the trustee, the disinterested person, or the court, of the average of the net fair market value of the assets held in the trust on the valuation date of the current valuation year and the net fair market value of the assets held in the trust on the valuation date of each prior valuation year, as defined in subdivision 55-15-1(10);
- (3) The percentage that may be elected by the trustee, the disinterested person, or the court in determining the unitrust amount shall be a reasonable current return from the trust, taking into account the intentions of the trustor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust. However, such election by the trustee, the disinterested person, or the court in determining the unitrust amount shall be three percent or greater;
- (4) The unitrust amount for the current valuation year shall be proportionately reduced for any distributions, in whole or in part, other than distributions of the unitrust amount, and for any payments of expenses, including debts, disbursements and taxes, from the trust within a current valuation year that the trustee determines to be material and substantial, and shall be proportionately increased for the receipt, other than a receipt that represents a return on investment, of any additional property into the trust within a current valuation year;
- (5) In the case of a short accounting period, the trustee shall prorate the unitrust amount on a daily basis;

- (6) If the net fair market value of an asset held in the trust has been incorrectly determined either in a current valuation year or in a prior valuation year, the unitrust amount shall be increased in the case of an undervaluation, or be decreased in the case of an overvaluation, by an amount equal to the difference between the unitrust amount determined based on the correct valuation of the asset and the unitrust amount originally determined;
- (7) In determining the net fair market value of the assets held in trust, the determination may not include the value of any residential property or any tangible personal property that, as of the first business day of the current valuation year, one or more income beneficiaries of the trust have or had the right to occupy, or have or had the right to possess or control, other than in a capacity as trustee, and instead the right of occupancy or the right of possession or control shall be deemed to be the unitrust amount with respect to the residential property or the tangible personal property; or any asset specifically given to a beneficiary under the terms of the trust and the return on investment on that asset, which return on investment shall be distributed to the beneficiary.

Section 40. That § 55-15-7 be repealed.

Section 41. That § 55-16-2 be amended to read as follows:

55-16-2. For the purposes of this chapter, a trust instrument, is an instrument appointing a qualified trustee for the property that is the subject of a disposition, which instrument:

- (1) Expressly incorporates the law of this state to govern the validity, construction, and administration of the trust;
- (2) Is irrevocable, but a trust instrument may not be deemed revocable on account of its inclusion of one or more of the following:
 - (a) A transferor's power to veto a distribution from the trust;
 - (b) An inter vivos power of appointment, other than an inter vivos power to appoint

to the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate, exercisable by will or other written instrument of the transferor effective only upon the transferor's death;

- (c) A testamentary power of appointment;
- (d) The transferor's potential or actual receipt of income, including rights to such income retained in the trust instrument;
- (e) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as such terms are defined in § 664 of the Internal Revenue Code of 1986, 26 U.S.C. § 664, as of January 1, 2009;
- (f) The transferor's receipt each year of a percentage of the value as determined from time to time pursuant to the trust instrument, but not exceeding the amount that may be defined as income under § 643(b) of the Internal Revenue Code of 1986, 26 U.S.C. § 643(b), as of January 1, 2009;
- (g) The transferor's potential or actual receipt or use of principal if such potential or actual receipt or use of principal would be the result of a qualified trustee or qualified trustees, including a qualified trustee or qualified trustees acting at the direction of a trust advisor described in this section, acting either in such qualified trustee's or qualified trustees' sole discretion or pursuant to an ascertainable standard contained in the trust instrument;
- (h) The transferor's right to remove a trustee or trust advisor and to appoint a new trustee or trust advisor, other than a person who is a related or subordinate party with respect to the transferor within the meaning of § 672(c) of the Internal Revenue Code of 1986, 26 U.S.C. § 672(c), as of January 1, 2009;

- (i) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of such term as described in § 2702(c) of the Internal Revenue Code of 1986, 26 U.S.C. § 2702(c), as of January 1, 2009;
 - (j) A pour back provision that pours back to the transferor's will or revocable trust all or part of the trust assets;
- (3) Provides that the interest of the transferor or other beneficiary in the trust property or the income therefrom may not be transferred, assigned, pledged, or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute the property or income therefrom to the beneficiary, and such provision of the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code, 11 U.S.C. § 541(c)(2), as of January 1, 2009;
- (4) A disposition by a trustee that is not a qualified trustee to a trustee that is a qualified trustee may not be treated as other than a qualified disposition solely because the trust instrument fails to meet the requirements of subdivision (1) of this section.

Section 42. That § 55-16-3 be amended to read as follows:

55-16-3. For the purposes of this chapter, a qualified person is any person who qualifies as a qualified person under § 55-3-41 and who meets all the requirements of § 55-3-39 other than the transferor.

Section 43. That chapter 55-16 be amended by adding thereto a NEW SECTION to read as follows:

The term, qualified trustee, as used in this chapter means qualified person. The code counsel in future supplements and revisions of the South Dakota Codified Laws shall substitute the term,

qualified person, and its derivatives for the term, qualified trustee, and its derivatives.

Section 44. That § 55-16-13 be amended to read as follows:

55-16-13. Notwithstanding any other provision of law, no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity against the trustee, or advisor described in § 55-16-4, of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution, or funding of a trust that is the subject of a qualified disposition, if, as of the date such action is brought, an action by a creditor with respect to such qualified disposition would be barred under §§ 55-16-9 to 55-16-12, inclusive. A court of this state has exclusive jurisdiction over an action brought under a claim for relief that is based on a transfer of property to a trust that is the subject of this section. A court of this state may award attorneys fees and costs to the prevailing party in such an action.

Section 45. That § 55-15-1 be amended to read as follows:

55-15-1. Terms used in this chapter mean:

- (1) "Disinterested person," any person who is not a related or subordinate party, as defined in section 672(c) of the Internal Revenue Code (26 U.S.C. section 1, et seq.), with respect to the person then acting as trustee of the trust and excludes the trustor of the trust and any interested trustee;
- (2) "Income trust," any trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee. However, no trust that otherwise is an income trust may qualify pursuant to this subdivision, if it is subject to taxation under I.R.C. section 2001 or section 2501, until the expiration of the period for filing the return therefor (including extensions);

- (3) "Interested distributee," any person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party, as defined in I.R.C. section 672(c), with respect to such distributee;
- (4) "Interested trustee," (i) any individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed, or (ii) any trustee who may be removed and replaced by an interested distributee, or (iii) any individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust, or (iv) any of the above;
- (5) "Total return unitrust," any income trust which has been converted under and meets the provisions of this chapter;
- (6) "Trustee," all persons acting as trustee of the trust, except where expressly noted otherwise, whether acting in their discretion or on the direction of one or more persons acting in a fiduciary capacity;
- (7) "Trustor," any individual who created an inter vivos or a testamentary trust;
- (7A) "Unitrust," a trust, the terms of which require or permit distribution of a unitrust amount, without regard to whether the trust has been converted to a unitrust in accordance with this chapter or whether the trust is established by express terms of the governing instrument;
- (8) "Unitrust amount," an amount equal to a percentage of a unitrust's assets that may or are required to be distributed to one or more beneficiaries annually in accordance with the terms of the unitrust. The unitrust amount may be determined by reference to the net fair market value of the unitrust's assets as of a particular date each year or as an average

determined on a multiple year basis;

- (9) "Current valuation year," the accounting period of the trust for which the unitrust amount is being determined;
- (10) "Prior valuation year," each of the two accounting periods of the trust immediately preceding the current valuation year; and
- (11) "I.R.C.," the Internal Revenue Code (26 U.S.C. section 1, et seq.).

An Act to revise certain provisions relating to trust administration.

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I certify that the attached Act
originated in the

SENATE as Bill No. 127

Secretary of the Senate
=====

President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 127

File No. _____

Chapter No. _____

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Received at this Executive Office
this _____ day of _____ ,

20____ at _____ M.

By _____
for the Governor
=====

The attached Act is hereby
approved this _____ day of
_____, A.D., 20____

Governor
=====

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 20____
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State